

RESOLUTION NO. 2006-75

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF FREMONT,
SUBMITTING TO THE QUALIFIED ELECTORS OF THE CITY AT THE
NOVEMBER 7, 2006, CONSOLIDATED GENERAL MUNICIPAL ELECTION
AN ORDINANCE TO ESTABLISH THE CITY OF FREMONT UTILITY USERS
TAX**

WHEREAS, the proposed utility users tax, attached hereto and incorporated herein by reference as Exhibit “A” (“the Ordinance”), will, if approved by the voters, establish the City of Fremont Utility Users Tax; and

WHEREAS, by Resolution No. 2006-48, adopted on June 13, 2006, the City Council called a General Municipal Election to be held on November 7, 2006 (“the Election”); and

WHEREAS, the Election is a regularly scheduled election for members of the City Council; and

WHEREAS, the City Council desires to submit the Ordinance to the voters at the Election;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF FREMONT DOES HEREBY RESOLVE AS FOLLOWS:

SECTION 1. The City Council finds and determines that each of the findings set forth above are true and correct.

SECTION 2. Pursuant to Government Code Section 53724(a), the City Council proposes to impose the City of Fremont Utility Users Tax as set forth in the Ordinance. The proposed type of tax, the rate of tax, and the method of tax collection are as set forth in the Ordinance. As set forth in Section 3 of this Resolution, the proposal will be presented to the voters at the November 7, 2006 Election.

SECTION 3. Pursuant to Government Code Section 53724(c), the City Council hereby declares its intent to consolidate the election on this proposal with the statewide general election to be held on November 7, 2006.

SECTION 4. Pursuant to Elections Code Section 9222, the City Council hereby submits the Ordinance to the voters at the Election and orders the following question to be submitted to the voters at the Election:

To help preserve the safety and character of Fremont and maintain essential general fund services such as police, fire and street and park maintenance, shall an ordinance be adopted establishing a gas and electric utility users tax of four percent, limited to six years and subject to independent annual financial audits, and establishing an independent Fremont taxpayers' committee to review expenditures?	YES
	NO

SECTION 5. The Ordinance to be submitted to the voters is attached to this Resolution as Exhibit "A" and incorporated herein.

SECTION 6. Notice of the time and place of holding the Election is hereby given, and the City Clerk is authorized, instructed and directed to give further additional notice of the Election in time, form and manner as required by law.

SECTION 7. Pursuant to California Elections Code Section 9280, the City Council hereby directs the City Clerk to transmit a copy of the measure to the City Attorney. The City Attorney shall prepare an impartial analysis of the measure, not to exceed 500 words in length, showing the effect of the measure on the existing law and the operation of the measure.

SECTION 8. The City Clerk is hereby authorized, instructed and directed to procure and furnish (or cause to be procured and furnished) any and all official ballot notices, printed matter and all other supplies, equipment and paraphernalia that may be necessary to prepare for and lawfully conduct the Election

SECTION 9. The City Council hereby requests the Alameda County Registrar of Voters to provide all services necessary to conduct the Election and to conduct and canvass the results of the Election.

SECTION 10. The City shall reimburse the Alameda County Registrar of Voters for services performed at the rate specified per registered voter in the City, when the work is completed and upon presentation to the City of a properly approved bill.

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SECTION 11. The City Clerk shall certify to the passage and adoption of this Resolution and shall transmit copies of this Resolution to the Alameda County Registrar of Voters and to the Alameda County Board of Supervisors.

ADOPTED: July 11, 2006 by the City Council of the City of Fremont by the following vote:

AYES: Mayor Wasserman, Vice Mayor Cho, Councilmembers Wieckowski, Natarajan and Dutra

NOES: None

ABSENT: None

ABSTAIN: None

Mayor

ATTEST:

APPROVED AS TO FORM:

City Clerk

Assistant City Attorney

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY OF FREMONT APPROVING
A 4% UTILITY USERS TAX ON ELECTRICITY AND GAS
FOR GENERAL FUND PURPOSES**

WHEREAS, in the last three years, difficult economic conditions have compelled the City to make significant reductions in critical police services such as gang and street crime prevention programs; and

WHEREAS, due to budget shortfalls, the City has been forced to close a fire station and shut down other fire stations on a rotating basis, impacting the fire department's ability to respond quickly to emergencies; and

WHEREAS, the City has had to reduce programs to repair potholes and deteriorating streets to accommodate budget shortfalls, thereby deferring maintenance to a future, and more costly, date; and

WHEREAS, support for library hours, senior services, and park and recreation programs are some of the other essential City services that have been reduced; and

WHEREAS, the City Council has evaluated the impacts of decreased General Fund revenues on the City's ability to provide vital services to the public, including the evaluation and implementation of measures to reduce costs, as well as measures to increase revenues; and

WHEREAS, in an effort to bring basic City services up to an acceptable level, the City Council provided comments, at the Council meeting of June 26, 2006, on a potential utility users tax ordinance for consideration by the voters on the November 7, 2006 ballot; and

WHEREAS, on July 11, 2006, the City Council voted to place on the November 7, 2006, ballot this Ordinance entitled "*An Ordinance of the City of Fremont Approving a 4 % Utility Users Tax on Electricity and Gas for General Fund Purposes*" (the "Ordinance"), by which the City Council proposed a general tax for voter approval at the rate of 4% of all charges for the use of the following utilities: electricity and gas; and

WHEREAS, a general tax measure imposed for general governmental purposes, such as this Ordinance, is required to be approved by at least a two-thirds vote of the City Council (i.e., at least four Council members), and approved by a majority vote of qualified voters at a regularly scheduled general election for members of the City Council (pursuant to California Constitution, Article XIII C, Section 2(b); and California Government Code Sections 53723 and 53724).

**NOW, THEREFORE, THE PEOPLE OF THE CITY OF FREMONT DO
ORDAIN AS FOLLOWS:**

SECTION 1. TITLE II, CHAPTER 6, ARTICLE 5, ADDED. Subject to voter approval and procedural requirements, Title II (Administration and Finance), Chapter 6 (Taxation), of the Fremont Municipal Code is hereby amended by adding a new Article 5, entitled “Utility Users Tax” to read in its entirety as follows:

ARTICLE 5. UTILITY USERS TAX

Sections:

- § 2-6500. Short Title, Authority, and Purpose.**
- § 2-6501. Definitions.**
- § 2-6502. Electricity Users Tax.**
- § 2-6503. Gas Users Tax.**
- § 2-6504. Election by Large Users to Make a Payment in Lieu of the Tax on Electricity and Gas**
- § 2-6504a. Exemptions, Exceptions, Bundling, and Nexus.**
- § 2-6505. Oversight Committee and Annual Review of Tax Levy.**
- § 2-6506. Duty to Collect (by Service Suppliers or Service Users): Procedures.**
- § 2-6507. Delinquencies, Deficiencies, and Collections.**
- § 2-6508. Additional Powers and Duties of the Tax Administrator.**
- § 2-6509. Records.**
- § 2-6510. Refunds.**
- § 2-6511. Appeals.**
- § 2-6512. Remedies Cumulative.**
- § 2-6513. Notice of Changes to Ordinance.**
- § 2-6514. Severability.**
- § 2-6515. Future Amendment to Cited Statute.**
- § 2-6516. Termination or Suspension of Utility Users Tax**

Sec. 2-6500. Short Title, Authority, and Purpose.

- (a) *Short Title.* This Title II, Chapter 6, Article 5 may be referred to as the “Utility Users Tax Ordinance.”
- (b) *Authority.* This Article is authorized by California Government Code Section 37100.5.
- (c) *Purpose.* The purpose of this Article is to impose a utility users tax as an excise tax on the use in the City of the following utilities: electricity and gas. The tax imposed pursuant to this Article shall be imposed for general governmental purposes in order to fund general city services, and to pay the usual and current expenses of conducting those general governmental purposes. The proceeds of the utility users tax shall be deposited into the General Fund of the City.

Sec. 2-6501. Definitions.

For the purpose of this Article, unless it is plainly evident from the context that a different meaning is intended, the definitions given in this section govern the construction of this Article:

“Billing Address” means the mailing address of a service user where a service supplier submits invoices or bills for payment by the service user.

“Business Day,” as to an act that cannot be taken unless Fremont City Hall is open for business, such as the filing of a tax return, means a day when Fremont City Hall is open. As to an act that can be taken when Fremont City Hall is not open for business, such as initiating an electronic funds transfer (EFT) payable to the City from a non-City account, “business day” means a day on which banks in and serving the City and its Service Suppliers are open for business.

“City Manager” means the City Manager of the City, or his or her designee.

“Cogenerator” means any corporation or person employing cogeneration (as defined in California Public Utilities Code Section 218.5) to produce power for the generation of electricity for his, her or its own use or sale to others from a qualified cogeneration facility (as defined in the federal Public Utility Regulatory Policies Act of 1978 and regulations thereunder).

“Electric corporation” means a person or corporation as defined in Public Utilities Code Section 218.

“Gas” means natural or manufactured gas or any alternate hydrocarbon fuel which may be substituted therefor.

“Large User” shall mean a Service User of electricity or gas who or which is, or based on their consumption of electricity would be, classified by Pacific Gas &

Electric Company (PG&E) or any successor in interest to PG&E, under a rate or tariff classification of “E-20” or the subsequent equivalent rate or tariff classification, or who consumes 10,000,000 kilowatts or more of electricity each year, or who consumes 100,000 therms or more of gas each year.

“*Month*” means a calendar month.

“*Non-utility Supplier*” means any or all of the following:

- (1) a Service Supplier (other than a supplier of electric distribution services to all or a significant portion of the City) which generates electricity for sale to others, and shall include, but is not limited to, any publicly-owned electric utility, investor-owned utility, cogenerator, municipal utility district, federal power marketing authority, electric rural cooperative, or other supplier or seller of electricity;
- (2) an electric service provider (ESP), electricity broker, marketer, aggregator, pool operator, or other electricity supplier (other than a supplier of electric distribution services to all or a significant portion of the City) which sells or supplies electricity or supplemental services to electricity users within the City;
- (3) a gas Service Supplier, aggregator, marketer, or broker, which sells or supplies gas to users within the City (other than a supplier of gas distribution services to all or a significant portion of the City);

“*Place of primary use*” means the street address representative of where the service user's use of the utility service primarily occurs, which must be the residential street address or the primary business street address of the service user.

“*Service Address*” means the residential street address or the business street address of the electric and/or gas service user.

“*Service Supplier*” means any entity or person, including the City, that provides electric and/or gas service to a Service User within the City, and includes an entity or person required to collect, or self-collect under Section 2-6506(b) of this Article, and remit a tax as imposed by this Article, including its billing agent.

“*Service User*” means a person required to pay a tax imposed under the provisions of this Article.

“*State*” means the State of California.

“*Tax*” means a tax imposed pursuant to this Article.

“*Tax Administrator*” means the Finance Director of the City, or any person

designated by the City Manager to perform the functions of the Tax Administrator specified in this Article.

Sec. 2-6502. Electricity Users Tax.

- (a) Except as otherwise provided in paragraph (b) of this section as to Large Users, there is hereby imposed a tax upon every person using electricity in the City at the rate of four percent (4%) of charges for such electricity, and for any supplemental services or other associated activities directly related and/or necessary for the provision of electricity to the Service User, which are provided by a Service Supplier or non-utility supplier to a service user. If the billing address of a Service User is different from his, her or its Service Address, the Service Address shall be used for purposes of imposing the tax.
- (b) The tax imposed by this section on Large Users shall be at the rate of one percent (1%) but shall otherwise be imposed as specified in paragraph (a) of this section, as long as the Large User notifies the City no later than November 15th each year that it meets the criteria for a Large User. New taxpayers who qualify as Large Users, or newly qualified Large Users, shall notify the Tax Administrator within 60 days of commencement of service or qualification that they meet the criteria for a Large User.
- (c) As used in this section, the term “charges” includes all sums due for services, components and items that are: (i) necessary or common to the receipt, use and enjoyment of electric service; or, (ii) currently, or historically have been, included in a single or bundled rate for electric service by a local distribution company to a class of retail customers. The term “charges” shall include, but is not limited to, the following:
 - (1) energy charges;
 - (2) distribution and transmission charges;
 - (3) metering charges;
 - (4) charges for stand-by, reserves, firming, ramping, voltage support, regulation, emergency, or charges for other, similar, services;
 - (5) customer charges, service establishment or reestablishment charges, demand charges, fuel or other cost adjustments, power exchange charges, independent system operator (ISO) charges, stranded investment or competitive transition charges (CTC), public purpose program charges, nuclear decommissioning charges, trust transfer amounts (bond financing charges), franchise fee, franchise surcharge, annual and monthly charges, and other

charges, fees and surcharges which are necessary to or common for the receipt, use and enjoyment of electric service; and

- (6) charges, fees, or surcharges for electricity services or programs, which are mandated by the California Public Utilities Commission, or the Federal Energy Regulatory Commission, whether or not such charges, fees, or surcharges appear on a bundled or line item basis on the customer billing.
- (d) As used in this section, the term “charges” shall include the value of any other services, credits, property of every kind or nature, or other consideration provided by a Service User in exchange for electricity or for services related to the provision of such electricity.
- (e) The Tax Administrator, from time to time, may survey electric Service Suppliers to identify the various unbundled billing components of electric retail service that they commonly provide to residential and commercial/industrial customers in the City, and the charges therefor, including items mandated by state or federal regulatory agencies as a condition of providing such electric service. The Tax Administrator may thereafter issue and disseminate to such electric Service Suppliers an administrative ruling (pursuant to Section 2-6508(b) of this Article) identifying those components and items which are subject to the tax imposed by this section.
- (f) As used in this section, the term “using electricity” shall not include the mere receipt of electricity by an Electrical Corporation or governmental agency at a point within the City for resale.
- (g) The tax imposed by this section shall also apply to the value of electricity used in the City that is provided by self-production or by a non-utility supplier, or an electric utility not under the jurisdiction of this Article, and shall be collected and remitted in the manner set forth in Section 2-6506(b). All other taxes on charges for electricity imposed by this section shall be collected from the Service User by the Service Supplier or any billing agent of the Service Supplier. The amount of the tax collected in one month by any person under this section shall be remitted to the Tax Administrator on or before the twentieth (20th) day of the following month or, at the option of the person required to collect or remit the tax, such person may remit an estimated amount of the tax measured by the tax billed in the previous month or upon the payment pattern of one or more Service Users, which must be received by the Tax Administrator on or before the twentieth (20th) day of the following month, provided that a person who remits such an estimated tax shall submit an adjusted payment or request for credit, as appropriate, within sixty (60) days following each calendar quarter. A credit approved by the Tax Administrator may be applied against any subsequent tax bill that becomes due.

Sec. 2-6503. Gas Users Tax.

- (a) Except as otherwise provided in paragraph (b) of this section as to Large Users, there is hereby imposed a tax upon every person using gas in the City, which is transported through a pipeline distribution system, at the rate of four percent (4%) of the charges made for such gas, including all services related to the storage, transportation, and delivery of such gas. If the billing address of a Service User is different from the Service Address of that Service User, the Service Address shall be used for purposes of imposing the tax.
- (b) The tax imposed by this section on Large Users shall be at the rate of one percent (1%) but shall otherwise be imposed as specified in paragraph (a) of this section, as long as the Large User notifies the City no later than November 15th each year that it meets the criteria for a Large User. New taxpayers who qualify as Large Users, or newly qualified Large Users, shall notify the Tax Administrator within 60 days of commencement of service or qualification that they meet the criteria for a Large User.
- (c) As used in this section, the term “charges” shall include all sums due for services, components and items that are: i) necessary or common to the receipt, use and enjoyment of gas service; or, ii) currently, or historically have been, included in a single or bundled rate for gas service by a local distribution company to a class of retail customers. The term “charges” shall include, but is not limited to, the following:
 - (1) commodity charges for purchased gas, or the cost of gas owned by a Service User (including the actual costs attributed to drilling, production, lifting, storage, gathering, trunkline, pipeline, and other operating costs associated with the production and delivery of such gas), which is delivered through a pipeline distribution system;
 - (2) gas transportation charges (including interstate charges to the extent not included in commodity charges);
 - (3) storage charges; provided, however, that the Service Supplier shall not be required to apply the tax to any charges for gas storage services when a Service Supplier cannot, as a practical matter, determine the jurisdiction where such stored gas is ultimately used; but in that case each Service User in the City shall be obligated to self-collect and remit in the manner set forth below the amount of tax not applied to any charge for gas storage by a Service Supplier;
 - (4) capacity or demand charges, service establishment or reestablishment charges, transition charges, customer charges, marketing charges, administrative charges, minimum charges,

annual and monthly charges, and any other charges which are necessary or common to the receipt, use and enjoyment of gas service; and

- (5) charges, fees, or surcharges for gas services or programs, which are mandated by the California Public Utilities Commission or the Federal Energy Regulatory Commission, whether or not such charges, fees, or surcharges appear on a bundled or line item basis on the customer billing.
- (d) As used in this section, the term “charges” shall include the value of any other services, credits, property of every kind or nature, or other consideration provided by a Service User in exchange for gas or services related to the delivery of gas.
- (e) The Tax Administrator, from time to time, may survey gas Service Suppliers to identify the various unbundled billing components of gas retail service that they commonly provide to customers in the City, and the charges therefor, including those items that are mandated by state or federal regulatory agencies as a condition of providing gas service. The Tax Administrator may thereafter issue and disseminate to gas Service Suppliers an administrative ruling (pursuant to Section 2-6508(b) of this Article) identifying those components and items which are subject to the tax imposed by this section.
- (f) There shall be excluded from the base of the tax imposed by this section charges for gas which is to be resold and delivered through a pipeline distribution system, although the tax shall apply upon resale and delivery of such gas for use in the City.
- (g) The tax imposed by this section shall also apply to the value of gas used in the City that is provided by self-production or by a non-utility supplier shall be collected and remitted in the manner set forth in Section 2-6506(b). All other taxes on charges for gas imposed by this section shall be collected from a Service User by the Service Supplier or any billing agent of the Service Supplier. The amount of tax collected in one month shall be remitted to the Tax Administrator, and must be received by the Tax Administrator on or before the twentieth (20th) day of the following month; or, at the option of the person required to collect or remit the tax, such person may remit an estimated amount of tax measured by the tax billed in the previous month or upon the payment pattern of one or more Service Users, which must be received by the Tax Administrator on or before the twentieth (20th) day of the following month, provided that a person who remits such an estimated tax shall submit an adjusted payment or request for credit, as appropriate, within sixty (60) days following each calendar quarter. A credit approved by the Tax Administrator may be applied against any subsequent tax bill that becomes due.

Sec. 2-6504. Election by Large Users to Make a Payment in Lieu of the Tax on Electricity and Gas.

- (a) A Large User may elect to make an annual payment of \$50,000 directly to the City, in lieu of paying the 1% tax on electricity and gas imposed by this Article. A payment in lieu of the tax may be made in a single payment on or before January 15th each year, or in twelve equal monthly installments on the 15th of each calendar month. A Large User electing an annual or monthly payment in lieu of the tax under this section must notify the Tax Administrator no later than November 15th each year of its election for the following calendar year. Upon such notification, the Tax Administrator will promptly notify the Service Supplier or Non-Utility Supplier not to collect the tax from that Large User.
- (b) Should a Large User who or which has elected to make a payment in lieu of the tax pursuant to paragraph (a) of this section determine that the payment in lieu of the tax exceeded the total of what it would have paid under the 1% tax rates on both electricity and gas services for a calendar year, the Large User may submit a request to the Tax Administrator for a refund of the difference. A request for refund shall be submitted to the Tax Administrator no later than February 1st for a refund based on gas and/or electricity consumed in the prior calendar year. A request for a refund shall document to the reasonable satisfaction of the Tax Administrator the amount and cost of gas and/or electricity consumed in the prior calendar year. Within 30 days of submittal of the documentation, the Tax Administrator shall determine if the Large User overpaid the taxes due under this Article. If so, the Tax Administrator shall issue the Large User a refund within 15 business days of his or her determination. The Tax Administrator's decision regarding any application for a refund is final.

Sec. 2-6504a. Exemptions, Exceptions, Bundling, and Nexus.

- (a) *Constitutional, Statutory and Local Exemptions.*
 - (1) The taxes imposed by this Article shall not apply to:
 - A. Any person or service if imposition of a tax upon that person or service would violate a statute, the Constitution of the United States or the Constitution of the State of California.
 - B. Charges for gas or electricity used by any local, state, or federal governmental entity, including the City.
 - C. Any participant in Pacific Gas & Electric Company's (PG&E's) "CARE" program which provides reduced rates

to low-income households, or subsequent program administered by PG&E or its successor which the Tax Administrator determines to be substantially similar to PG&E's CARE program.

- (2) Any Service User exempt from a tax imposed by this Article shall file an application with the Tax Administrator for an exemption; provided, however, this requirement shall not apply to a Service User that is a government agency with a commonly recognized name, or to a Service User enrolled in PG&E's "CARE" program or subsequent similar program as set forth in paragraph (a)(1)(C) in this section. The application shall be made upon a form approved by the Tax Administrator and shall state under penalty of perjury facts that qualify the applicant for exemption, and shall include the names of all Service Suppliers serving that Service User. A Service User shall give the Tax Administrator timely written notice of any change in Service Suppliers so that the Tax Administrator can notify a new Service Supplier of the Service User's exempt status. A Service User shall give the Tax Administrator timely written notice of any change in the facts which justify an exemption from a tax imposed under this Article to allow the Tax Administrator to terminate that Service User's exempt status. Any failure to do so shall be punishable or remediable as any other willful failure to pay a tax due under this Article. A Service User that fails to comply with this section shall not be entitled to a refund of taxes collected and remitted to the Tax Administrator as a result of such non-compliance. Upon request of the Tax Administrator, a Service Supplier or Non-Utility Supplier, or any billing agent of a Service Supplier or Non-Utility Supplier, shall provide a list of names and addresses of Service Users which, according to their billing records, are deemed exempt from a tax imposed under this Article.
- (b) *Exceptions Approved by City Council.* The City Council may, by order or resolution, establish exceptions to a tax imposed by to this Article as follows:

 - (1) The City Council may identify one or more classes of Service Users or one or more classes of services (including subclasses of types of energy or products, such as energy efficient services) otherwise subject to a tax imposed by this Article and provide that such Service User(s) or service(s) shall be exempt from the tax, in whole or part. The City Council may specify a period of time after which the exception shall automatically terminate and the consequent re-imposition of the tax as specified in this Article shall not require further voter approval.

- (2) The City Council may reduce the rate of any tax imposed by this Article. The City Council may specify a period of time after which the exception shall automatically terminate and the consequent re-imposition of the tax as specified in this Article shall not require further voter approval.
 - (3) Upon establishment of an exception by City Council pursuant to this subsection (b), the City Council may subsequently repeal or modify the exception.
 - (4) Any action taken by City Council pursuant to this paragraph (b) to establish an exception to a tax or to repeal or modify such an exception shall not constitute an “extension” or “increase” of the tax imposed by this Article, provided that the action taken by City Council does not cause the rate of the tax to exceed the percentage rates set forth in this Article (as authorized by California Constitution Article XIII C, Section 2(b), and California Government Code section 53750(h)(2)) and therefore no voter approval of such actions shall be required.
- (c) *Bundling Taxable and Non-Taxable Items.* Except as otherwise provided by state or federal law, or as approved in writing by the Tax Administrator, if one or more non-taxable items or services are bundled or aggregated together with one or more taxable items or services for a single charge, the entire single charge shall be deemed taxable, it being the obligation of the Service Supplier or Non-Utility Supplier to structure its charges so as to distinguish between taxable and non-taxable charges if it wishes the benefit of tax exemptions for its Service Users.
 - (d) *Substantial Nexus / Minimum Contacts.* For purposes of imposing a tax or establishing a duty to collect and remit a tax under this Article, “substantial nexus” and “minimum contacts” shall be construed broadly in favor of the imposition, collection and/or remittance of the utility users tax to the fullest extent permitted by state and federal law, and as it may change from time to time by judicial interpretation or by statutory enactment. Should the Tax Administrator forebear from enforcing the duty of any Service User, Service Supplier or Non-Utility Supplier to pay, collect or remit any tax imposed by this Article in a good faith effort to resolve a dispute regarding the duty of that person to pay, collect or remit such tax, the Tax Administrator may thereafter enforce the tax as imposed by this Article without further voter approval.

Sec. 2-6505. Oversight Committee and Annual Review of Tax Levy.

- (a) *Oversight Committee.* The City Council shall establish a Utility Users

Taxpayers Oversight Committee (“Committee”) to review public records regarding the revenue generated by the tax (including any exceptions granted pursuant to Section 2-6504a, paragraph (b) of this Article) and how the revenue is used by the City. The composition and duties of the Committee, consistent with the purposes set forth herein, shall be determined by resolution of the City Council.

- (b) *Annual Review of Tax Levy.* The City Council shall review the revenue generated by the taxes imposed by this Article not less than annually (including any exceptions granted pursuant to Section 2-6504a, paragraph (b) of this Article), how the revenue is used by the City, and any recommendations made by the Committee pursuant to this section. Upon review of this information, the City Council shall, concurrently with the establishment of the annual City budget, determine whether to establish, continue, or repeal any exceptions to the tax pursuant to Section 2-6504a, paragraph (b) of this Article.

Sec. 2-6506. Duty to Collect (by Service Suppliers or Service Users): Procedures.

- (a) *Collection by Service Suppliers.* The duty of Service Suppliers to collect and remit the taxes imposed by this Article shall be performed as follows:
 - (1) The tax shall be collected by Service Suppliers insofar as practicable at the same time as, and along with, charges for service made in accordance with the regular billing practices of the Service Supplier.
 - (2) If a Service Supplier’s regular billing practice includes the collection of charges from property owners where the Service Users are tenants, the Service Supplier shall collect the tax from the property owners. The property owner may collect the tax from his or her tenant. This same requirement shall apply to any other person lawfully charged by a Service Supplier for services to a different Service User.
 - (3) Where the amount paid by a Service User to a Service Supplier is less than the full amount of the charge and tax which was accrued for the billing period, a proportionate share of both the charge and the tax shall be deemed to have been paid. In those cases where a Service User has notified a Service Supplier of refusal to pay a tax imposed under this Article, Section 2-6507(c) shall apply.
 - (4) The duty of a Service Supplier to collect a tax from a Service User shall commence with the beginning of the first regular billing period applicable to the Service User for services to which the tax applies. Where a Service User receives bills for different periods,

the duty to pay, collect and remit the taxes imposed by this Article shall arise separately with respect to each billing period.

- (b) *Payment By Service Users Receiving Direct Purchase of Gas or Electricity.*
 - (1) Any Service User subject to a tax imposed by Sections 2-6502 or 2-6503 who or which produces gas or electricity for his, her or its own use, or receives gas or electricity directly from a Non-Utility Supplier, or otherwise does not pay the full tax due on the use of gas or electricity in the City to a Service Supplier or a billing agent of a Service Supplier, shall report that fact and remit the tax due directly to the Tax Administrator within thirty (30) days of such untaxed use. A Service User may, at its option, remit to the Tax Administrator within thirty (30) days of such untaxed use an estimated amount of tax measured by the tax due in the previous month, or upon the pattern payment of similar customers of the Service Supplier using similar amounts of gas or electricity. Any person who makes such estimated payment shall submit an adjusted payment or request for credit, as appropriate, within sixty (60) days following each calendar quarter. A credit approved by the Tax Administrator may be applied against any subsequent tax bill that becomes due.
 - (2) The Tax Administrator may require a Service User obligated to directly pay tax under this section to identify its Non-Utility Supplier and provide, and permit the Tax Administrator to audit, invoices, books of account, or other evidence documenting to the reasonable satisfaction of the Tax Administrator the quantity and cost of the gas or electricity used. If a Service User is unable to provide such satisfactory evidence, or, if the administrative cost of calculating the tax is excessive in the reasonable opinion of the Tax Administrator, the Tax Administrator may determine the tax due by applying the tax rate specified by this Article to a reasonable estimate of the charges the Service User would have incurred for gas or electricity provided by the Service Supplier, which is the primary supplier of gas or electricity within the City. The Tax Administrator shall make rate schedules for this purpose available on request.
- (c) *Filing Return and Payment.* Each person required by this Article to remit a tax shall file a return to the Tax Administrator, on forms approved by the Tax Administrator, on or before the date the tax is due. The full amount of the tax collected shall be paid with the return. The Tax Administrator is authorized to require such additional information as he or she deems necessary to determine if tax is being levied, collected, and remitted in accordance with this Article. Returns are also due immediately upon

cessation of business in the City for any reason. Pursuant to California Revenue and Tax Code Section 7284.6, the Tax Administrator shall maintain such filing returns as confidential information exempt from disclosure provisions of the California Public Records Act.

Sec. 2-6507. Delinquencies, Deficiencies, and Collections.

(a) *Collection Penalties – Service Suppliers and Self-Collectors.*

- (1) Taxes paid by a Service User, by a Service Supplier, or self-collected by a Service User subject to Section 2-6506(b) of this Article, are delinquent if not received by the Tax Administrator on or before the date those taxes are due under this Article. Should a payment be due on a day other than a Business Day, the return must be received by the Tax Administrator on or before the first Business Day thereafter. A direct deposit, including electronic fund transfers and other similar methods of electronically exchanging monies between financial accounts, made by a service supplier in satisfaction of its obligations under this subsection, shall be timely if initiated on or before the due date, and the transfer settles into the City's account on or before the following Business Day.
- (2) If a Service Supplier, or a Service User subject to Section 2-6506(b) of this Article, fails to remit any tax collected, on or before the date the tax is due under this Article, then that person shall pay a penalty of fifteen percent (15%) of the delinquent tax and shall pay interest at the rate of three-quarters of one percent ($\frac{3}{4}\%$) per month, or any fraction thereof, on the delinquent tax, exclusive of penalties, from the date the tax was due until paid.
- (3) The Tax Administrator may impose an additional penalty upon persons required to collect and/or remit taxes pursuant to the provisions of this Article for fraud or gross negligence in reporting or remitting in the amount of fifteen percent (15%) of the tax collected and/or required to be remitted, as determined by the Tax Administrator.
- (4) Every penalty imposed and such interest that is accrued under the provisions of this Article shall become a part of the tax herein required to be paid.

(b) *Deficiency Determination and Assessment – Tax Application Errors.*

- (1) The Tax Administrator shall make a deficiency determination if he or she determines that any person required to pay, collect or remit taxes pursuant to this Article has failed to pay, collect, and/or remit the correct amount of tax due.

- (2) The Tax Administrator shall mail a notice of a deficiency determination to the person required to collect, pay or remit the tax, which notice shall state the amount of tax due, plus interest and penalties as provided in this Article. Within fourteen (14) calendar days after such a notice is mailed, the person to whom the notice is addressed may make a written request to the Tax Administrator for a hearing on the matter. If the person to whom the notice is addressed fails to request a hearing within that time, the deficiency determination shall become final and immediately due and owing to the City.
- (3) If the person to whom a deficiency notice is addressed timely requests a hearing, the Tax Administrator shall set the matter for a hearing to be held within thirty (30) days after the Tax Administrator's receipt of the request. Notice of the time and place of the hearing shall be mailed by the Tax Administrator to the person who requested a hearing at least ten (10) calendar days prior to the hearing, and shall state any records the Tax Administrator reasonably requests to aid in determination of the matter.
- (4) At the hearing, the Tax Administrator or any hearing officer designated by the Tax Administrator shall hear all relevant testimony and evidence, including that of any other interested parties. At the discretion of the Tax Administrator, the hearing may be continued from time to time. Within a reasonable time after the hearing, the Tax Administrator shall issue a final determination confirming, modifying or rescinding the deficiency determination, and shall mail a copy of that determination to the person to whom the deficiency notice was addressed. The decision of the Tax Administrator may be appealed pursuant to Section 2-6511 of this Article. No suit may be maintained to challenge a deficiency determination under this Article unless the person whose obligations under this Article are in issue has first timely sought a hearing before the Tax Administrator pursuant to this section and timely appeal the Tax Administrator's determination pursuant to Section 2-6511 of this Article.
- (5) Payment of the final assessment shall be delinquent if not received by the Tax Administrator on or before the thirtieth (30th) day following the date of the notice of final assessment and shall thereafter be subject to late penalties and interest as provided in paragraph (a) of this section.
- (6) All notices under this section may be sent by regular mail, postage prepaid.

(c) *Administrative Remedy - Non-Paying Service Users.*

- (1) Whenever the Tax Administrator determines that a Service User has deliberately withheld the amount of the tax owed from amounts remitted to a Service Supplier or other person required to collect a tax under this Article, or whenever the Tax Administrator deems it in the best interest of the City, the Tax Administrator may by written notice relieve a Service Supplier or other person of the obligation to collect one or more taxes due under this Article from named Service Users for specific billing periods. If a Service User fails to pay the amount of tax owed for a period of two (2) or more billing periods while paying other charges due to a Service Supplier, the Service Supplier shall be relieved of the obligation to collect taxes due. The Service Supplier shall give the Tax Administrator written notice of the names and addresses of such Service Users and of the amounts owed by each such Service User under this Article.
 - (2) The Tax Administrator shall notify the non-paying Service User that the Tax Administrator has assumed responsibility to collect the taxes due for the stated periods and demand payment of such taxes, including penalties and interest. The notice shall be served on the Service User by personal delivery or by deposit of the notice in the United States mail, postage prepaid, addressed to the service user at the address to which billing was made by the Service Supplier or other person required to collect the tax; or, to the last address of the Service User known to the Tax Administrator.
- (d) *Actions to Collect.* Any tax required to be paid by a Service User under the provisions of this Article shall be deemed a debt owed by the Service User to the City until paid to the Tax Collector or any person obligated to collect the tax under this Article. Any tax collected from a Service User which has not been remitted to the Tax Administrator shall be deemed a debt owed to the City by the person required to collect and remit the tax. Any person owing money to the City under any provision of this Article shall be liable in an action brought in the name of the City for the recovery of such amount, including penalties and interest as provided for in this Article, along with any collection costs incurred by the City as a result of the person's noncompliance with this Article, including, but not limited to, reasonable attorneys' fees and court costs. Any tax required to be collected by a service supplier or owed by a service user is an unsecured priority excise tax obligation under 11 U.S.C. Section 507(a)(8)(C).

Sec. 2-6508. Additional Powers and Duties of the Tax Administrator.

- (a) The Tax Administrator shall have the power and duty, and is hereby directed, to enforce this Article.

- (b) The Tax Administrator may adopt administrative rules and regulations consistent with provisions of this Article to interpret, clarify, carry out and enforce the payment, collection and remittance of the taxes, penalties and interest due under this Article.
 - (1) An administrative ruling may include any or all of the following:
 - A. the definition, interpretation, or application of rulings by courts of competent jurisdiction, or of state or federal legislation or administrative rulings, for purposes of taxation.
 - B. the definition, interpretation, or application of industry custom and practice, including but not limited to determining: (i) the services necessary or common to the receipt, use or enjoyment of each utility service, or (ii) the services currently, or historically, included in a single or bundled rate for each utility service.
 - (2) A copy of such administrative rules and regulations shall be on file in the Tax Administrator's office.
 - (3) An administrative ruling by the Tax Administrator pursuant to this paragraph (b) shall not constitute an “extension” or “increase” of the tax imposed by this Article requiring voter approval, provided that the ruling does not cause the rate of a tax to exceed the rates set forth in this Article or expand the base of any tax beyond that specified by this Article (as authorized by California Constitution Article XIIC, Section 2(b), and California Government Code section 53750(h)(2)).
- (c) The Tax Administrator may make administrative agreements to vary from the strict requirements of this Article to: (i) conform to the billing procedures of a particular Service Supplier (or Service User subject to Section 2-6506(b) of this Article) if such agreements result in the collection of the tax in conformance with the general purpose and scope of this Article; or, (ii) avoid circumstances in which the administrative costs to collect and remit the tax exceed the tax due. A copy of each such agreement shall be on file in the Tax Administrator's office, and are revocable by the Tax Administrator at any time on reasonable written notice.
- (d) The Tax Administrator may conduct an audit to ensure compliance with this Article, of any person required to pay, collect and/or remit a tax pursuant to this Article. The Tax Administrator shall give written notice to the subject of such an audit. In the absence of fraud or other intentional misconduct, an audit shall not extend beyond the three (3) years preceding

the date of the notice of audit. Upon completion of an audit, the Tax Administrator may make a deficiency determination pursuant to Section 2-6507(b) of this Article for all taxes, penalties and interest owed and not paid. If the subject of an audit is unable or unwilling to provide sufficient records to enable the Tax Administrator to verify compliance with this Article, the Tax Administrator shall make a reasonable estimate of the deficiency.

- (e) Upon receipt of a written request of a taxpayer, and for good cause, the Tax Administrator may extend the time for filing any statement required pursuant to this Article for up to forty-five (45) days, provided that the time for filing the required statement has not already passed when the request is received. No penalty for delinquent payment shall accrue by reason of such extension. Interest shall accrue during said extension at the rate of three-quarters of one percent ($\frac{3}{4}\%$) per month, prorated for any portion thereof.
- (f) The Tax Administrator shall determine the eligibility of any person who asserts a right to exemption from, or a refund of, the tax imposed by this Article.
- (g) The City Manager may compromise a claim made pursuant to this Article in accordance with the authority set forth in Fremont Municipal Code section 2-9202(b)(12).
- (h) Notwithstanding any provision in this Article to the contrary, the Tax Administrator may waive any penalty or interest imposed upon a person required to collect and/or remit a tax under this Article for failure to collect the tax imposed by this Article if the non-collection occurred in good faith. In determining whether the non-collection was in good faith, the Tax Administrator shall take into consideration industry practice or other precedents.

Sec. 2-6509. Records.

- (a) It shall be the duty of every person required to pay, collect and/or remit any tax imposed by this Article to keep and preserve, for a period of at least three (3) years, all records as may be necessary to determine the amount of such tax as he/she may have been liable for the collection of and remittance to the Tax Administrator, which records the Tax Administrator shall have the right to inspect at all reasonable times.
- (b) The Tax Administrator may issue an administrative subpoena to compel a person to deliver copies of all records deemed necessary by the Tax Administrator to establish compliance with this Article, including the delivery of records in a common electronic format on readily available media if such records are maintained electronically by the subject of the

subpoena. As an alternative to delivering the subpoenaed records to the Tax Administrator on or before the due date provided in the administrative subpoena, such person may provide access to such records outside the City on or before the due date, provided that such person shall reimburse the Tax Administrator for all reasonable travel expenses incurred by the Tax Administrator to inspect those records, including travel, lodging, meals, and other similar expenses, but excluding the normal salary or hourly wages of those persons designated by the Tax Administrator to conduct the inspection.

- (c) The Tax Administrator may execute a non-disclosure agreement in a form approved by the City Attorney to protect the confidentiality of customer information pursuant to California Revenue and Tax Code Sections 7284.6 and 7284.7. The Tax Administrator may request from a person transporting gas or electricity to Service Users within the City a list of the names and addresses, and other pertinent information, of its transportation customers within the City pursuant to California Public Utilities Code Section 6354(e).
- (d) If a Service Supplier uses a billing agent or billing aggregator to bill, collect, and/or remit the tax, the Service Supplier shall: i) provide the Tax Administrator the name, address and telephone number of each billing agent and billing aggregator authorized by the Service Supplier to bill, collect, and/or remit the tax to the City; and, ii) upon request of the Tax Administrator, deliver any information or records in the possession of such billing agent or billing aggregator that, in the opinion of the Tax Administrator, is or are necessary to verify the application, calculation, collection and/or remittance of taxes to the City as required by this Article.
- (e) If any person required to keep records under this section unreasonably denies the Tax Administrator access to such records, or fails to produce the information requested in an administrative subpoena within the time specified, then the Tax Administrator may impose a penalty of \$500 on such person for each day following: i) the initial date that the person refuses to provide such access; or, ii) the due date for production of records as set forth in the administrative subpoena. This penalty shall be in addition to any other penalty imposed under this Article.

Sec. 2-6510. Refunds.

Whenever the amount of any tax has been overpaid or paid more than once or has been erroneously or illegally collected or received by the Tax Administrator under this Article, it may be refunded as provided in this section:

- (a) The Tax Administrator may refund any tax that has been overpaid or paid more than once or has been erroneously or illegally collected or received by the Tax Administrator under this Article, provided that no refund shall

be paid under the provisions of this section unless the claimant or his or her guardian, conservator, executor, or administrator has submitted a written claim to the Tax Administrator within one year of the overpayment or erroneous or illegal collection of said tax pursuant to the provisions of this section and all claims filing requirements of the Fremont Municipal Code. Such claim must clearly establish claimant's right to the refund by written records showing entitlement thereto. Nothing herein shall permit the filing of a claim on behalf of a class or group of taxpayers.

- (b) The submission of a written claim, which is acted upon by the City Council, shall be a prerequisite to a suit thereon as authorized by California Government Code Section 935. The City Council shall act upon the refund claim within the time period set forth in California Government Code Section 912.4. If the City Council fails or refuses to act on a refund claim within the time prescribed by California Government Section 912.4, the claim shall be deemed to have been rejected by the City Council on the last day of the period within which the City Council was required to act upon the claim as provided in California Government Code Section 912.4.
- (c) Notwithstanding the claim requirement of paragraph (a) of this section, a Service Supplier that has collected any amount of tax in excess of the amount of tax imposed by this Article and actually due from a Service User (whether due to overpayment or to erroneous or illegal collection of said tax), may refund such amount to the Service User, or credit to charges subsequently payable by the Service User to the Service Supplier, and claim credit for such overpayment against the amount of tax which is due upon any other monthly returns to the Tax Administrator, provided such credit is claimed in a return dated no later than one year from the date of overpayment or erroneous or illegal collection of said tax. The Tax Administrator shall determine the validity of a Service User's claim of credit, and the underlying basis for such claim.
- (d) Notwithstanding other provisions of this section, whenever a Service Supplier, pursuant to an order of the California Public Utilities Commission, makes a refund to Service Users of charges for past utility services, the taxes paid pursuant to this Article on the amount of such refunded charges shall also be refunded to Service Users, and the Service Supplier shall be entitled to claim a credit for such refunded taxes against the amount of tax which is due upon the next monthly returns. In the event this ordinance is repealed, the amounts of any taxes refundable thereafter will be borne by the City if timely claimed as required by this Article.
- (e) Notwithstanding paragraphs (a) and (b) above, a Service Supplier shall be entitled to take any overpayment as a credit against an underpayment whenever such overpayment has been received by the City within the year preceding a notice of tax deficiency or assessment by the Tax Administrator pursuant to an audit under Section 2-6508(d), or during any

year for which the Service Supplier, at the request of the Tax Administrator, has executed a waiver of the defense of the statute of limitations with regard to any claim the City may have for sums due under this Article. Under no circumstances shall an overpayment taken as a credit against an underpayment pursuant to this subsection qualify a Service Supplier for a refund to which it would not otherwise be entitled under the one-year written claim requirement of this section.

Sec. 2-6511. Appeals.

- (a) Any decision (other than a decision relating to a refund pursuant to Section 2-6510 of this Article), deficiency determination, assessment, or administrative ruling of the Tax Administrator may be appealed pursuant to this section. A person aggrieved by an action appealable under this section may appeal to the City Manager by filing a notice of appeal with the City Clerk within fourteen (14) days of the date of the action which is the subject of the appeal.
- (b) The appeal shall be scheduled for hearing before a hearing officer selected by the City Manager, no more than thirty (30) days from the date the City Clerk receives a timely appeal. The appellant shall be served with notice of the time and place of the hearing at least five (5) calendar days prior to the hearing. The hearing may be continued from time to time in the reasonable discretion of the hearing officer. At the time of the hearing, the appealing party, the Tax Administrator, and any other interested person may present relevant evidence as to the action from which the appeal is taken.
- (c) Based upon the evidence submitted and review of the City's files, the hearing officer shall issue a written draft notice and order to the City Manager within ten (10) days after the conclusion of the hearing, and recommend upholding, modifying or reversing the action from which the appeal is taken, and the City Manager shall then issue a notice and order of decision within fourteen (14) days after receipt of the recommendation and shall state the reasons for the decision. The notice shall specify that the decision is final and that any petition for judicial review shall be filed within ninety (90) days from the date of the decision in accordance with Code of Civil Procedure Section 1094.6. If the City Manager fails or refuses to act on a refund claim within the fourteen (14) day period, the claim shall be deemed to have been rejected on the fourteenth (14th) day and the time for suit shall commence to run from that fourteenth day.
- (d) All notices under this section may be sent by regular mail, postage prepaid, and shall be deemed received on the third calendar day following the date of mailing, as established by a proof of mailing.

Sec. 2-6512. Remedies Cumulative.

All remedies and penalties prescribed by this Article or available under any other provision of law or equity, including but not limited to the California False Claims Act (California Government Code Section 12650 et seq.) and the California Unfair Practices Act (California Business and Professions Code Section 17000 et seq.), are cumulative. The use of one or more remedies by the City shall not bar the use of any other remedy for the purpose of enforcing the provisions of this Article.

Sec. 2-6513. Notice of Changes to Ordinance.

If a tax under this Article is added, repealed, increased, reduced, or the tax base is changed, the Tax Administrator shall follow the notice requirements of California Public Utilities Code Section 799. Prior to the effective date of the ordinance change, each Service Supplier shall provide the Tax Administrator with a copy of any written procedures describing the information that the Service Supplier needs to implement the ordinance change. If the Service Supplier fails to provide such written instructions, the Tax Administrator, or his or her agent, shall send, by first class mail, postage prepaid, a copy of the ordinance change to all collectors and remitters of the City's utility users taxes according to the latest payment records of the Tax Administrator.

Sec. 2-6514. Severability.

If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Article or any part thereof is for any reason held to be invalid, unlawful or unconstitutional, such decision shall not affect the validity of the remaining portion of this Article or any part thereof. The People of the City of Fremont hereby declares that they would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases be declared invalid, unlawful or unconstitutional.

Sec. 2-6515. Future Amendment to Cited Statute.

Unless specifically provided otherwise, any reference to a state or federal statute in this Article shall mean such statute as it may be amended from time to time.

Sec. 2-6516. Termination or Suspension of Utility Users Tax.

The taxes imposed by this Article shall expire six years after they are first implemented by each Service Supplier obligated to collect and remit taxes under this Article unless the voters of the City reenact or extend these taxes. All

provisions in this Article, except those relating to the levy of taxes, shall continue with full force and effect after such date.